

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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RECEIVED  
JUL 25 2024  
SC Court of Appeals

APPEAL FROM SOUTH CAROLINA  
SC Workers' Compensation Commission  
Appellate Panel

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Appellate Case No. 2022-000282

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Michael K. Crowley, Employee, ..... Appellant,

v.

Darlington County, Employer, and  
SC Association of Counties SIF, Carrier, ..... Respondents.

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PETITION FOR REHEARING EN BANC  
PURSUANT TO RULE 219(a)(1)(2), SCACR

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Pursuant to Rule 219(a)(1)(2), SCACR, the Appellant would respectfully submit that the Members of the Court should review the Petition for Rehearing filed with the Panel pursuant to Rule 221, SCACR and the Court should grant Rehearing En Banc in reference to the Opinion in the above-referenced matter pursuant to:

1. Subsection 1 of Rule 219, SCACR because a hearing by the full Court is necessary to secure and maintain uniformity of its Decisions.

The Members of the Court will find upon review that the Decision of the Court, specifically in reference to "**B. Loss of Earning Capacity**", is in direct conflict with the Panel of the Court's Published Opinion in Dent v. East Richland County Pub. Svc. Dist., 423 S.C. 193, 813 S.E.2<sup>nd</sup> 886, reh. den. (SC App. 2018) applying the substantial evidence standard to the definition of total disability based on wage loss. The Court will find that the Panel failed to apply or even cite the opinions of the SC Supreme Court and this Court defining total disability for a loss of earning capacity under SC Code §42-9-10(A) as established by the Supreme Court, first in Colvin v. E.I. DuPont de Nemours, 327 S.C. 465, 88 S.E.2<sup>nd</sup> 581 (1955), and established as the definitive definition in Wynn v. People's Natural Gas Co. of S.C., 238 S.C. 1, 118 S.E.2d 812 (1961), which is quoted in Dent.

2. The Court should hear this matter En Banc pursuant to subsection (2) because the Panel's decision finding the violation of the **mandatory** exclusion provisions of SC Code §42-15-95 in reference to the submission and consideration of the evidence of Dr. Bethea but yet affirmed because it found the admission to be a harmless error involves a question of exceptional importance.

While the Panel found that the **mandatory** provisions of §42-15-95 were violated, they go on to find that the violation was harmless error. That holding eviscerates the purpose and intent

of the mandatory exclusion provision of SC Code §42-15-95. While there are multiple decisions by the Supreme Court and this Court concerning mandatory statutory provisions and requirements, Counsel has not found any and does not know of any Opinion/Decision by either Court where the violation of the mandatory statutory provision was found to be harmless error and went without severe consequences. See for example: Collins v. Doe, 352 S.C. 462, 574 S.E.2d 739 (2002); Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (SC App. 2006).

In the Panel of the Court's Opinion and in the Commission's Award, reference is made to and reliance is given to Dr. Bethea's impairment rating and Dr. Bethea's work restrictions. To allow the Respondents the ability to violate the mandatory exclusionary provisions of the Statute, which was adopted after Brown v. Bi-lo, Inc., 354 S.C. 436, 581 S.E.2d 836 (2003) (no contact except by deposition or express permission) to allow insurance carriers and employers the opportunity to speak to a claimant's doctor without his permission but with his knowledge on a very limited basis and on specific related issues with impunity would defeat the Legislative intent. To find a violation of that mandatory prohibitive and exclusionary Rule but yet find that violation to be harmless error and not require at least a remand for a de novo hearing, eviscerates the purpose of the statute and exposes the injured workers of our State to

the unyielding economic power of the out-of-state insurance industry and the wealthiest of our country. If this were a criminal case and this was the fruit of the poisonous tree, it would require reversal of the decision and a new trial; if it were an uninsured motorist claim it would result in a directed verdict; or if it were a Workers' Compensation Commission stop payment violation, a mandatory penalty; nothing less should happen here. Otherwise, the efforts and intent of the General Assembly have no meaning and a never ending search for and litigation over ways to claim harmless error.

3. The Court on review of the Opinion should grant rehearing en banc because the Opinion of the Panel concerning an Award under SC Code §42-9-30(21) for loss of use to do work and what constitutes evidence on loss of use involves a question of exceptional importance.

Pursuant to the SC Constitution, Judicial Department Art. V. §9 and because the Panel did not have the benefit of Paulino v. Diversified Coatings, Inc., 2024 WL 319928, Op. No. 28212 filed June 26, 2024, the same day as this Opinion addressing loss of use versus medical impairment opinion evidence, a question of exceptional importance is presented. The Members of this Court on review will find that the Panel's Opinion is eerily reminiscent of the Panel's decision in Clemmons v. Lowe's Home Centers, Inc., 412 S.C. 366, 772 S.E.2d 517, which was reversed by the Supreme Court in Clemmons v. Lowe's Home Centers, Inc., 420 S.C. 282, 803 S.E.2d 268 (2017). The Panel

clearly misunderstood the difference between medical impairment opinion evidence and evidence concerning the essential issue of loss of use. The Panel also clearly misunderstood that the Record contained specific medical opinion evidence on the essential issue for decision, "loss of use". Medical impairment evidence does not concern or constitute substantial evidence on the essential issue of loss of use to do work especially where there is medical opinion evidence in the Record before the Court for decision.

CONCLUSION

Especially in light of the Supreme Court's decision in Paulino on loss of use and medical impairment evidence, the issues are of exceptional importance and to insure uniformity, the Court should grant Rehearing En Banc.

Respectfully submitted,



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Attorneys for the Appellant

July 25, 2024

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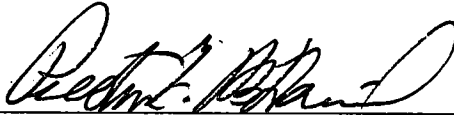
PROOF OF SERVICE

I hereby certify that I have served the following:

- 1) PETITION FOR REHEARING EN BANC PURSUANT TO RULE 219(a)(1)(2), SCACR; and
- 2) PETITION FOR REHEARING PURSUANT TO RULE 221, SCACR

on this date, July 25, 2024, addressed as follows:

VIA EMAIL AND US MAIL  
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Proudly representing injured workers  
for over 35 years.

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July 25, 2024

**VIA HAND DELIVERY**

Honorable Jenny A. Kitchings, Clerk  
SC Court of Appeals  
1220 Senate Street  
Columbia, South Carolina 29201

**RECEIVED**

JUL 25 2024

SC Court of Appeals

**RE: Michael Crowley v. Darlington County  
Appellate Case No. 2022-000282**

Dear Ms. Kitchings:

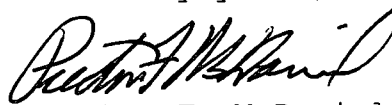
Please find enclosed the original and required copies of our Petition for Rehearing En Banc pursuant to Rule 219(a)(1)(2), SCACR and our Petition for Rehearing regarding the Opinion in the above-referenced matter pursuant to Rule 221(a). The required filing fees for both Petitions are enclosed. By copy of this letter, I am notifying and serving Counsel for the Respondents with copies of the Petitions.

I particularly look forward to hearing from the Court, based on the Supreme Court's decision in Paulino v. Diversified Coatings, Inc., Op. No. 28212, filed June 26, 2024, the same day that this Unpublished Opinion was filed by the Panel.

Finally, Mr. Baxley has just filed a Petition for Rehearing on behalf of the Respondents and since Mr. Baxley was so kind to grant me a 15 day extension on my behalf to file the Petition for Rehearing, and while the Court granted me extensions for filing Petitions for Rehearing, I have no objection to Mr. Baxley's Petition which was filed within the time of the extensions granted to me.

As always, I appreciate all of the courtesies and kindnesses shown to me by you, your office and the Court.

Sincerely yours,



Preston F. McDaniel

PFM/kth  
Enclosures

cc: Gerald Malloy, Esquire  
Johnnie W. Baxley, Esquire